

**STATEMENT OF
RICK SURRATT
DEPUTY NATIONAL LEGISLATIVE DIRECTOR
OF THE
DISABLED AMERICAN VETERANS
BEFORE THE
COMMITTEE ON VETERANS' AFFAIRS
SUBCOMMITTEE ON DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS
MAY 5, 2005**

Mr. Chairman and Members of the Subcommittee:

I am pleased to appear before you on behalf of the Disabled American Veterans (DAV) and its Auxiliary to present our organization's views on the functioning and performance of the appellate operations of the United States Department of Veterans Affairs (VA), as carried out by its Board of Veterans' Appeals (BVA or Board) and Appeals Management Center (AMC). Made up of service-connected disabled veterans, the DAV is an organization whose members, and family members in the Auxiliary, have a special interest in the subject of today's oversight hearing. Incidental to our close interaction with VA, we also conduct ongoing monitoring of its performance and thereby endeavor to be a partner in your oversight role.

Benefits for disabled veterans and their dependents and survivors are at the core of the programs VA administers. The effective administration of programs, including appellate review of claims decisions, is essential to the fulfillment of VA's momentous mission to care for our Nation's veterans. Approximately 95 percent of BVA's workload involves disability compensation and pension claims. Your oversight to ensure VA is faithfully executing and properly implementing the law and effectively managing the programs Congress created for veterans is necessary to guarantee veterans receive the benefits to which they are entitled by law and to impose the accountability for results and efficiency that our citizens rightfully demand. Your vigilant oversight of performance, your watchfulness of execution of the laws, creates an incentive for better performance by VA.

Our laws, like the human relationships they regulate, are often complex and ever evolving. The laws that govern veterans' rights and benefits are no different. These laws can be quite complicated, especially where they deal with cause-and-effect relationships between service in the Armed Forces and diseases and injuries, and the quantification of disability from those diseases and injuries for compensation purposes. Thus, in veterans' benefits, as it is generally, law is not an exact science. Because of the variables of human interactions and the consequent nuances inherent in the factual bases on which legal rights rest, adjudications require the intervention of human judgment. Such judgment is, of course, not infallible. Under our legal system, we therefore view the right to appeal as an important element of fairness and necessary to safeguard against injustices that result from human error. Because appellate review is so essential to ensuring justice in an unavoidably imperfect adjudication system, the proper functioning of appellate processes is of major importance, especially where the rights and benefits of our veterans are involved.

As a statutory board, BVA was created in recognition of the importance of an effective appellate body within the VA administrative process and after experiments with other variations of appellate review had proven unsatisfactory. By consolidating and centralizing the appellate board in Washington, D.C., under the authority of the agency head, then the Administrator of VA, the problems of decentralization, lack of uniformity, and the lack of finality were addressed through a clearer sense of direction. By Executive Order issued July 28, 1933, President Franklin D. Roosevelt established BVA, and that Executive Order was promulgated as Veterans Regulation No. 2(a), which later became law through operation of statutory provision. By Veterans Regulation No 2(a), the President mandated that BVA would sit at VA's Central Office, be directly under the Administrator, provide one review on appeal to the Administrator, afford "every opportunity" for a "full and free consideration and determination," provide "every possible assistance" to appellants, have final authority, and take final action that would be "fair to the veteran as well as the Government." Since its inception, BVA has operated separate and independent from the other elements of VA. While there have been some changes in its configuration since 1933, BVA has retained its basic concept and mission.

As it exists today, BVA's mission is still to make the final decision on behalf of the VA Secretary in claims for benefits. Section 7104 of title 38, United States Code, provides: "All questions in a matter which . . . is subject to a decision by the Secretary shall be subject to one review on appeal to the Secretary. Final decisions on such appeals shall be made by the Board." The Board operates under various statutory provisions codified at chapter 71 of title 38, United States Code, as well as regulations in part 19 and rules of practice in part 20 of title 38, Code of Federal Regulations.

Although BVA generally makes the final decision in an appeal, the appellate process begins with the VA field office that made the decision appealed, referred to as the agency of original jurisdiction, and, in some instances, action by the agency of original jurisdiction in an appealed case alleviates the need for a final decision by BVA. An appeal may be favorably resolved by the agency of original jurisdiction before the case is transferred to BVA or after the case has been sent back, "remanded," to the agency of original jurisdiction to cure some procedural omission or record defect. Up to 50 percent of the appealed cases are resolved by the agencies of original jurisdiction and never reach the Board. However, about 75 percent of the remanded cases are returned to the Board for a final decision.

A veteran or other claimant initiates an appeal by filing a "notice of disagreement" with the agency of original jurisdiction. The agency of original jurisdiction may then take such additional development or review action as it deems proper. If such action does not resolve the disagreement, the agency of original jurisdiction issues to the appellant a "statement of the case" that contains a summary of the pertinent evidence, a citation of the pertinent legal authorities along with an explanation of their effect, and an explanation of the reasons for the decision on each issue. To complete, or "perfect," the appeal, the appellant must then file with the agency of original jurisdiction a "substantive appeal," a written statement specifying the benefit or benefits sought and the bases of the appellant's belief that he or she is legally entitled to the benefit or benefits. Upon receipt of the substantive appeal, VA enters the case on the BVA docket. The BVA docket is a list of cases perfected for appellate review compiled by the chronological order in which the substantive appeal was received. The Board receives these cases for review by their

order on the docket, although a case may be advanced on the docket for demonstrated hardship or other good cause. The Board must afford each appellant an opportunity for a hearing before deciding his or her appeal. The hearing may be held before the BVA at its principal office or at a VA facility located within the area served by appellant's VA regional office. The Board may enter a decision that orders the granting of appropriate relief, denying relief, or remanding the appeal for further action by the agency of original jurisdiction.

The Board may reconsider its decision upon an order by its chairman on the chairman's initiative or upon a motion by the claimant, and the Board may correct an obvious error in the record without regard to an order for reconsideration. The Board is also empowered to revise its decision on grounds of clear and unmistakable error. The Board may undertake review on grounds of clear and unmistakable error on the Board's own initiative or at the request of the claimant.

Claimants for veterans' benefits who believe BVA made factual or legal errors in deciding their claims may appeal to the United States Court of Appeals for Veterans Claims (CAVC or Court). The Court may affirm or reverse the BVA decision, or remand for further action. The landmark legislation enacted in 1988 that subjected BVA decisions to the scrutiny of an independent court has necessitated positive reforms in BVA decision-making. Because the Board's decisions must be justified with an explanation of the factual findings and legal conclusions and because VA must defend its decisions in court, denials that go against the weight of the evidence or law have declined. The Board allows and remands substantially higher percentages of appeals than it did before judicial review.

During 2004, 2,234 claimants appealed to CAVC. The Court decided 1,780 cases, with an average processing time from filing of the appeal to disposition of 392 days. Of that total, 1,087 cases, or 61 percent, were either reversed/vacated and remanded or remanded because of some substantive error or procedural defect. This reflects a high error rate among those BVA decisions appealed to the Court.

The DAV's judicial appeals representatives complain that the Board, with increasing frequency, is deviating from the Court's orders reversing and/or remanding cases with specific instructions. The Board's failure to adhere to the Court's orders is blatantly unlawful. The Board's defiance of the Court's mandates breaks down the order and discipline imperative in appellate systems where inferior tribunals are legally bound to adhere to the orders of superior tribunals.

During fiscal year (FY) 2004, 108,931 new notices of disagreement were received by VA, 49,638 appeals were perfected and added to BVA's docket, 39,956 cases were physically transferred from agencies of original jurisdiction to BVA, and the Board decided 38,371 cases. The Board began FY 2004 with 27,230 cases pending before it and ended the year with 28,815 cases pending. Accordingly, the number of new appeals added to the Board's docket during the year exceeded the number of cases it decided by 11,267, and the number of new appeals added to the Board's docket exceeded the number of cases transferred to the Board for a decision by 9,682. The Board decided 1,585 fewer cases than it received from field offices.

At the end of FY 2004, there were more than 161,000 cases in field offices in various stages of the appellate process, including the 31,645 on remand. Some of these appeals will be resolved at the field office level, but about three-quarters of them will come before the Board. At the end of March 2005, there were 51,508 cases on the BVA docket.

During FY 2004, the average time for resolving an appeal, from the filing of the notice of disagreement to the date of the decision was 960 days. Of this total, 734.2 days was the average time an appeal was pending in the field office, from the notice of disagreement to the transfer of the case to BVA, with an average of 225.6 days from the date of receipt of the case at BVA to the date of the decision. During FY 2004, the average number of days an appeal was pending in the New York City VA regional office before being transferred to BVA was 1,978.7 days, with 1,707.5 of those days representing the time after the appeal was perfected and the case was ready for transfer. For a New York case, the average total processing time for an appeal during FY 2004 was 2,136.7 days, almost 6 years. Nine VA regional offices exceeded 1,000 days for the average time an appeal was pending at the field office. As of March 31, 2005, the average total days for cases pending in the field was 832.8 days and the average time at BVA was 202.2 days. Of course, for those cases remanded, the total processing time is considerably longer. In FY 2004, an additional 155.6 days were added to the total processing time of appeals for the time the case spent at BVA the second time following the remand, and this does not include the number of days the case was on remand at the field office. During FY 2004, 7,140 cases were returned to the Board following remands. The remands took an average of 22 months. As noted, there were 31,645 cases on remand at the end of 2004. Of the 38,371 cases decided by BVA in FY 2004, approximately 21 percent had been previously remanded. With these long processing times, far too many disabled veterans die before their appeals can be decided. Three obvious conclusions follow from these numbers: (1) most of the delay in these unreasonably protracted appeals processing times is at the field office level, (2) far too many cases must be remanded more than once, and (3) multiple remands add substantially to the workload of BVA.

The Board allowed 17.1 percent of the cases it decided during FY 2004. Approximately 24 percent of those allowed cases had been previously remanded. The Board remanded 56.8 percent of the cases it reviewed during FY 2004. Of those remanded cases, 18 percent had been remanded previously, suggesting that the field office did not fulfill the Board's instructions in the remand order. Together, the allowed and remanded cases represented 73.9 percent of the Board's total case dispositions in 2004. Denials amounted to only 24.2 percent of the total dispositions. In addition to noting the high percentage of cases remanded multiple times, three conclusions can be drawn from these percentages: within these appealed cases, (1) agencies of original jurisdiction have denied many meritorious claims, (2) agencies of original jurisdiction have denied many cases without proper record development, and (3) only a relatively small percentage of these appellants had unwarranted appeals.

Because of the large volume of appeals, the BVA is experiencing some shortage of storage space for claims files. The Board is in the beginning stages of a planned move to more suitable office space, which will include more storage space. Under the timetable in the plan, BVA will relocate in FY 2007.

Since the expiration of the former Board Chairman's term in October 2004, the Board has been without a chairman. Strong leadership and clear direction is needed at this level to ensure the Board maintains its independence from other elements of VA.

Additionally, the Board has suffered reductions in its staffing levels in the past few years. Despite increasing workloads, the President's FY 2006 budget again calls for a further decrease in staffing from 440 fulltime employees (FTE) to 434 FTE. This would be down from 455 FTE in FY 2001. If future backlogs and delays in appellate processing are to be avoided, BVA must have the additional resources necessary to meet this increasing workload.

In August 2001, VA proposed to amend the Board's regulations to enable the Board to perform record development itself and make a decision on that evidence rather than remand the case to the agency of original jurisdiction for these purposes. For several reasons related to unfairness and inefficiency, the DAV urged VA not to issue a final rule to authorize this practice. We also noted that such a rule would be unlawful because it would deprive claimants of the statutory right to have a decision by VA and one administrative appeal from that decision. The DAV proposed an alternative in which a special unit of Veterans Benefits Administration (VBA) personnel in Washington could perform the remand development and make a new decision on the additional evidence. This would be a shortcut to avoid the delay of a remand to the regional office. The goal of speeding up the process could be accomplished without any denial of due process for the claimant. VA brushed aside our objections and recommendations and issued a final rule for this purpose in January 2002. To handle this work, BVA created its Evidence Development Unit, which began operations in February 2002. The DAV, joined by three other organizations, challenged this rule in the United States Court of Appeals for the Federal Circuit. In its May 1, 2003, decision, the Federal Circuit invalidated the rule as unlawful. As a result, VA created a special VBA unit, the AMC, to perform remand functions.

The AMC develops and decides approximately 96 percent of the BVA remands. The issues involved in the other 4 percent are more appropriately handled by the field offices. Although the average time a case was in remand status during FY 2004 was 22 months because a portion of the cases were old ones remanded to field offices, the portion of the remanded cases that were developed and decided by the AMC were on remand an average of approximately 203 days. As of April 23, 2005, the average days a case is on remand before the AMC had more than doubled, to 412.6 days. The AMC currently completes work on an average of 231 cases a week, and 20,970 cases were assigned to AMC as of April 25, 2005.

This backlog resulted from the bulk transfer of approximately 9,000 cases from the Board to the AMC in the first quarter of FY 2004. These were cases in which further development was pending at the Board. Of course, the AMC had both the responsibility to develop and adjudicate these cases. In the beginning when the AMC was first organized, it had to cope with new processes and adjudicators, and it was understandably not up to full efficiency. As a consequence, cases began to back up.

Because the volume of work at the AMC was higher than expected, VBA developed a plan in December 2004 to have three VA regional offices do a portion of the remands. These offices are located in Huntington, West Virginia; St. Petersburg, Florida; and Cleveland, Ohio.

Initially, the plan was that cases already developed and ready to adjudicate would go to the Huntington and St. Petersburg offices. Huntington was expected to adjudicate and authorize awards for 300 cases per month. St. Petersburg was expected to adjudicate and authorize 500 cases per month. Cleveland was expected to develop, adjudicate, and authorize 600 cases per month. The Huntington and St. Petersburg offices found that some of the cases they received from the AMC were not actually ready to adjudicate. These offices began to undertake development also. The AMC currently sends 1,300 cases a month to the AMC teams at the three regional offices.

Our DAV representatives at BVA observed that some of the earlier cases returned to the Board from the AMC were not developed in compliance with the remand orders. However, with AMC employees gaining experience, the quality of development has improved. The AMC is viewed as an improvement over the prior procedure in which all cases were remanded to agencies of original jurisdiction because cases are more strictly controlled and not left to languish in field offices for years as too often happened before. Our representatives at the AMC also report that AMC adjudicators are granting the benefits sought in many of these appeals.

When the BVA allows an appeal, it returns the case to the AMC rather than the agency of original jurisdiction to effectuate the award of benefits. The case often must go to the AMC because the appeal also involves a remanded issue. A major complaint is that the AMC delays the award of benefits on the allowed portion of the appeal for an average of 90 days. Even where the case involves no remanded issue, the case is sent from BVA to the AMC for the award of benefits, and this results in unnecessary delay. In such instances, the case should be returned to the agency of original jurisdiction for a prompt award. Many of these claims have been pending for years.

Our St. Petersburg DAV office reported that one troublesome problem experienced by the AMC team there is the receipt of mail from the Washington AMC that had been received while the claims file was at the AMC but not entered into the claims folder. The AMC forwards this mail to the AMC team in St. Petersburg many months later, sometimes after the case has already been adjudicated and readied for return to BVA. Apparently, this has happened in a noticeable number of cases.

Currently, VBA has 134 FTE devoted to the AMC and its three outstations. The AMC has 87 FTE. St. Petersburg has 25 FTE, Huntington has 8 FTE, and Cleveland has 14 FTE devoted to their AMC Resource Units. If the BVA remand rate remains at or near 50% of its dispositions, it is projected that VBA will need to increase its staffing for this activity to 145-150 FTE in FY 2006.

Focus on the BVA and the AMC alone does not present a complete picture of the effectiveness of VA's appellate processes. The timeliness and propriety of actions on appeals by agencies of original jurisdiction in preparing the case for BVA review and in completing remand actions after BVA review account for much of the overall appellate processing time and necessity to rework the case. The available data show the error rates in appealed cases are high and that the process takes an inexcusably long time, thereby delaying disability and other benefits for many veterans with meritorious claims and immediate needs. The problem of

appeals languishing in regional offices for years is not a new one. The responsible VBA officials need to take more decisive action to correct this problem. Board officials need to take the necessary steps to reduce error rates in BVA decisions and to ensure binding court mandates are carried out. With recent increases in the appellate caseloads and no corresponding increase in staffing, timeliness at BVA and the AMC is likely to suffer even more. Congress needs to address BVA staffing more seriously.

We appreciate the Subcommittee's interest in these issues, and we appreciate the opportunity to provide you with the DAV's views. We hope our views will be helpful to the Subcommittee.